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No. 83-514

In the Supreme Court of the United States

OCTOBER TERM, 1983

ELIZABETH JANE HALL, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Petitioner brought this action for damages and injunctive relief against the United States, two officials of the Internal Revenue Service, and a Kentucky police officer.[1] The court of appeals affirmed an award of summary judgment in

[1]The injunctive aspect of this case was considered by this Court in *Laing* v. *United States*, 423 U.S. 161 (1976), which involved both petitioner and an unrelated taxpayer. After noting that it had "granted certiorari to resolve [a] conflict" among the circuits on the question (423 U.S. at 167, 169), the Court held that a taxpayer is entitled to receive a notice of deficiency when his taxable year is terminated under Section 6851 of the Internal Revenue Code of 1954 (26 U.S.C.) (hereinafter "the Code" or "I.R.C."), and that, because such a notice had not been sent to petitioner, she was entitled to enjoin the government from selling her property (423 U.S. at 168-171, 184-186 n.27). The substantive issues decided in *Laing* are not involved here. Rather, that decision is relevant primarily because it sheds light on the unsettled state of the law at the time of the official actions upon which petitioner's damages claim is based.

favor of respondent McHugh, an I.R.S. official, holding that he was entitled to a defense of qualified immunity; and it affirmed an award of summary judgment in favor of respondent Snider, the other I.R.S. official, holding that petitioner had not stated a claim against him on which relief could be granted. Petitioner seeks review[2] of these holdings.[3]

1. The pertinent facts may be summarized as follows: On January 31, 1973, after petitioner's husband had been arrested on drug-related charges, Kentucky state troopers searched her home pursuant to a valid warrant (Pet. App. 18a). They found controlled substances there (*ibid.*). The next day, respondent McHugh, as Acting District Director of Internal Revenue in Louisville, Kentucky, determined that petitioner's involvement in drug activities "tend[ed] to prejudice or to render * * * ineffectual proceedings to collect [her] income tax for the current * * * taxable year," within the meaning of Section 6851(a)(1) of the Code. In accordance with that Section, McHugh terminated petitioner's 1973 taxable year and declared her income tax for the first 30 days of the year "immediately due and payable." He assessed a tax of $52,680 for that period (Pet. App. 18a). When petitioner failed to pay the tax thus assessed, I.R.S. collection officers levied on her property, including her bank account and a 1970 Volkswagen automobile (*id.* at 1a,

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[2]The court of appeals entered judgment on March 25, 1983, and denied rehearing on April 29, 1983. See 704 F.2d 246 (6th Cir.). Petitioner's motion for an extension of time to file a petition for a writ of certiorari, which was filed on or before July 25, 1983, was thus timely. On July 25, 1983, the Chief Justice extended the time for filing a petition to September 26, 1983. The petition was filed on that date.

[3]The court of appeals also upheld the dismissal of petitioner's claim against the United States, reasoning that the government had not waived sovereign immunity (Pet. App. 12a-13a, 24a-25a); and against the Kentucky police officer, reasoning that petitioner could make out no claim against him on the merits (Pet. App. 15a-16a, 26a-27a). Petitioner does not appear to seek review of these holdings. See Pet. 2.

18a). Shortly thereafter, petitioner brought this action in the United States District Court for the Western District of Kentucky, seeking injunctive relief and damages. As noted above (p. 1 n.1, *supra*), petitioner's claim for injunctive relief was ultimately upheld by this Court in *Laing* v. *United States*, 423 U.S. 161 (1976). The Court there interpreted Section 6861 of the Code to require that the I.R.S. send a deficiency notice to a taxpayer within 60 days of making a termination assessment and before selling the taxpayer's property.

Following this Court's decision, the district court considered petitioner's claims for damages, which had been held in abeyance. It found that respondent McHugh was not "in direct contact with the officer who seized [petitioner's] automobile" and that McHugh's role was limited to "approving, upon recommendation, the termination of [petitioner's] taxable year and in levying the tax assessment" (Pet. App. 2a). Petitioner admitted that she did not know McHugh and had never spoken to him (*id.* at 2a). The court found that respondent Snider, a group manager in the Louisville District Director's Office, was "one of many persons who 'signed off' on the paperwork as it crept toward final approval" by McHugh (*id.* at 9a), and that Snider's only other involvement consisted of appearance at a single meeting, in McHugh's absence, with petitioner's lawyers (*id.* at 10a). Petitioner conceded that she had never seen Snider or spoken with him (*id.* at 9a-10a). Based on these findings, the trial judge, assuming *arguendo* that the doctrine of *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), extended to this case, awarded summary judgment to both respondents. He held that McHugh's acts were "protected under the doctrine of official immunity" outlined in *Barr* v. *Matteo*, 360 U.S. 564 (1959) (Pet. App. 5a), and that petitioner had failed to state a claim against Snider on which relief could be granted (*id.* at 10a-11a).

2. The court of appeals unanimously affirmed. It disagreed with the district court's conclusion that McHugh was entitled to absolute immunity, noting that petitioner had alleged a due process violation, not a common law tort. Pet. App. 20a-21a, citing *Butz* v. *Economou*, 438 U.S. 478, 507 (1978). But it held that McHugh was entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), reasoning that approval of termination assessments was a discretionary function within the scope of his office (Pet. App. 22a) and that, in failing to send petitioner a deficiency notice, McHugh "did not violate clearly established statutory or constitutional rights of which a reasonable person would have known at the time the action occurred" (*id.* at 23a). The court likewise upheld the dismissal of petitioner's claim against respondent Snider, noting that his "only connection to the present action [was] his mere approval of a routine field audit" and that petitioner had pointed to no evidence, apart from "bare conclusive allegations," that Snider had "personally deprived her of any statutory or constitutional rights" (*id.* at 24a).

3. The court of appeals correctly applied the principles of qualified immunity to the facts of this case. In *Harlow*, this Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. In February 1973, when the actions of which petitioner complains occurred, a taxpayer had no "clearly established right," under either the Code or the Due Process Clause, to receive a notice of deficiency when a termination assessment was made. The only court of appeals that had considered the statutory question had held that the Code

afforded no such right,[4] and the district courts in the other circuits were divided.[5] Indeed, when this Court (by a 5 to 3 vote and after reargument of the case) settled the statutory question in 1976, it noted that it had "granted certiorari to resolve [a] conflict" among the circuits. *Laing*, 423 U.S. at 167, 169. A taxpayer's right under the Due Process Clause to receive a notice of deficiency in these circumstances, furthermore, was even more speculative. No court had decided that question as of February 1973;[6] the only courts that have decided it subsequently have held that no such right exists;[7] and this Court specifically reserved the question in *Laing*.[8] Because neither the statutory nor the constitutional law on the subject was "clearly established" in February 1973, respondent McHugh, in approving the

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[4] *Williamson* v. *United States*, 31 A.F.T.R.2d(P-H) para. 73-456 (7th Cir. 1971).

[5] Compare, *e.g.*, *Irving* v. *Gray*, 344 F. Supp. 567, 571-572 (S.D. N.Y. 1972), aff'd, 479 F.2d 20 (2d Cir. 1973) (holding that a deficiency notice was not required), with *Rambo* v. *United States*, 353 F. Supp. 1021 (W.D. Ky. 1972), aff'd, 492 F.2d 1060 (6th Cir. 1974), cert. denied, 423 U.S. 1091 (1976) (holding that a deficiency notice was required), and *Schreck* v. *United States*, 301 F. Supp. 1265, 1267-1268, 1284 (D. Md. 1969) (same).

[6] But cf. *Schreck*, 301 F. Supp. at 1281 (suggesting, without deciding, that failure to send a deficiency notice in termination situations "raises constitutional questions of equal protection and due process").

[7] *Laing* v. *United States*, 364 F. Supp. 469, 471 (D. Vt. 1973), aff'd, 496 F.2d 853, 854 (2d Cir. 1974), rev'd on other grounds, 423 U.S. 161 (1976). But cf. *Rambo*, 492 F.2d at 1065 (suggesting that failure to send a deficiency notice in termination situations "could very well raise" due process questions).

[8] 423 U.S. at 183-184 n.26. Compare *id.* at 187 (Brennan, J., concurring) (suggesting that Section 6851(a)(1) "falls short * * * of meeting due process requirements") with *id.* at 206 (Blackmun, J., dissenting) (concluding that due process does not require a deficiency notice in termination situations because "the taxpayer has a variety of remedies to test the validity of the Commissioner's action"). See *Phillips* v. *Commissioner*, 283 U.S. 589, 595-596 (1931) (holding that the Constitution does not require a prepayment forum to adjudicate tax disputes).

termination assessment, "could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Harlow*, 457 U.S. at 818. The court of appeals thus correctly determined that McHugh was entitled to qualified immunity.[9]

There is no merit to petitioner's contention (Pet. 6) that the decision below conflicts with *Rutherford* v. *United States*, 702 F.2d 580 (5th Cir. 1983). That case involved a *Bivens* claim for damages against an allegedly abusive I.R.S. agent. The Fifth Circuit held that plaintiffs' complaint stated a cause of action for violation of protected "liberty interests" (702 F.2d at 583-584), and remanded for consideration of several "questions [that] remain[ed] unresolved," including the agent's possible "claim of qualified immunity" (*id.* at 584). For the guidance of the trial judge on remand, the Fifth Circuit quoted relevant passages from *Harlow* and urged the district court "to give special attention * * * to deciding whether the [plaintiffs] have shown that [the agent's] actions violated a constitutional right so clearly established that immunity would not attach" (*id.* at 585).

4. Finally, the court of appeals properly held (Pet. App. 24a) that petitioner's failure "to come forward to show genuine issues of material fact warrant[ed] summary judgment for [respondent] Snider." The latter's involvement

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[9]Under *Harlow*, the "subjective element of the good-faith defense" —whether the official " 'took the action *with the malicious intention* to cause a deprivation of constitutional rights or other injury' " — is generally immaterial. See 457 U.S. at 815-818 (emphasis added), quoting *Wood* v. *Strickland*, 420 U.S. 308, 322 (1975). Even if McHugh's subjective intent were relevant, petitioner offered no proof of malice on his part; indeed, she admitted (see p. 3, *supra*) that she did not know McHugh and had never spoken with him.

was minimal and there was no evidence that he had personally deprived petitioner of any rights. This factual determination, in any event, does not merit this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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